U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Washington, DC 20001-8002

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Case Number:

2002-INA-1	**2002-INA-11**	**2002-INA-21**
2002-INA-2	**2002-INA-12**	**2002-INA-22**
2002-INA-3	**2002-INA-13**	**2002-INA-23**
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2002-INA-9	**2002-INA-19**	**2002-INA-29**
2002-INA-10	**2002-INA-20**	**2002-INA-30**

P2000-GU-0947

In the Matter of:

H & W Pacific Corp. Ltd.,
Employer.

On Behalf Of::

He Guo Hua	**Jiang Tai Xiang**	**Gu Yu Ming**
Gu Jian Hua	**Chen Tan Qiang**	**Huang Jian Jun**
Yan You Liang	**Yan Pei Yan**	**Kang Xin Ming**
Qian Jin Rong	**Hu Guo Hua**	**Zhou Jian Guo**
Lu Pu Xi	**Ding Xiao Ping**	**Chen Da Fu**
Deng Cheng Xian	**Qu Guo Han**	**Ding Guo Sheng**
Zhou Ping	**Zhang Hua**	**Huang Jian Hua**
Ji Guo Ping	**Yao Jin Sheng**	**Gao Wei Ping**
Lu Pu Liang	**Hai Rong Chen**	**Fan Guo Hua**
Jin De Xue	**Gu Jian Jun**	**Zhu Jian Guo**

Aliens.

Certifying Officer: Armando Quiroz
San Francisco, California

Appearance:

Robert N. Davis, Esq.
Hagatna, Guam
For Employer

Before: **Vittone, Burke and Chapman**

These cases arose from applications for labor certification on behalf of the above named Aliens ("Aliens") filed by H & W Pacific Corp. Ltd. ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor denied the applications, and the Employer requested review pursuant to 20 C.F.R. § 656.26.

The following decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal Files ("AF") and any written argument of the parties.[1]

STATEMENT OF THE CASE

On April 22, 1999, the Employer filed applications for alien employment certification on behalf of 30 Aliens to fill the position of Cement Mason. Minimum requirements for the positions were listed as a sixth grade education and two years experience in the job offered. The rate of pay for the position was listed as $10.83 an hour. The duties were described as follows:

> Lays concrete blocks, mixes cement using shovel, hand tools and mixing machines. Smooths and finishes surfaces of poured concrete floors, walls, sidewalks or curbs to specified textures. Using hand tools and power tools including floats, trowels, screeds to specified depth and workable consistency. Removes rough and defective spots from concrete surfaces. Sets stones in/on poured concrete and levels. Smooths and shapes surfaces of freshly poured concrete using hand tools and power tools.

NOTICES OF FINDINGS

The Certifying Officer (CO) issued Notices of Findings (NOFs), proposing to deny labor certification based upon a number of grounds.[2] The CO indicated that the Guam Department of Labor had notified the U.S. Department of Labor that the Employer recently laid off U.S. workers due to the

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[1] The Employer submitted one brief in support of its appeal in these 30 cases.

[2] Except for the names of the Aliens, and the dates of issuance of the NOFs and FDs, the files in each of these cases are identical.

"company's economic reasons." According to the CO, the number of permanent alien labor certification applications submitted by the Employer appeared to exceed the Employer's workforce. The CO stated that, as lay-offs may result in the availability of qualified and willing U.S. workers, the Employer was required to present documentation about the effect of the lay-offs on positions with the same or similar requirements as set out in the ETA 750. Specifically, the Employer was instructed to notify any U.S. workers with the same or similar qualifications of the instant job offers and report the results of such recruitment.

Additionally, the Employer was instructed to document which company units/offices and occupations were affected by the lay-off situation, including the numbers of each occupation affected, and the steps that were being taken concerning re-employment or relocation of the laid-off individuals. The Employer was instructed to provide detailed information about the company downsizing, including the names and job titles of all of the workers who left the company since the downsizing began. The Employer was instructed to provide documentation showing the total number of cement masons, including those who had left the company. The Employer was also instructed to indicate whether any of the former workers were qualified, and if so, how the Employer attempted to recruit them.

The CO stated that without such documentation, the Department of Labor would be unable to determine the unavailability of able, willing, and qualified U.S. workers.

The CO noted that the Employer submitted a list of laid-off workers, indicating that, due to financial constraints, they were let go. However, there was no indication of how many employees remained, or the size of the operation. Noting that a large number of applications had been submitted, the CO stated that if these employees were hired, the wages paid to them on a permanent, full-time basis would be very high. According to the CO, the Guam Department of Labor had indicated that although the Employer stated that the workers were needed for an upcoming housing project, there was no evidence of such a large project.

The Employer was instructed to submit evidence showing that the Employer's income was sufficient to pay the offered wages to full-time, permanent cement masons. The CO indicated that the evidence could include a certified financial statement, or the most recent corporation tax return showing income. The CO instructed that the evidence should include the Employer's several most recent IRS Forms 941, showing wages paid to employees in recent quarters. Noting that the Employer's attorney referred to "planning in advance for processing delays," the CO stated:

> [a]n employer may not speculate that there may be sufficient ability to pay the wages at a later date. The employer must provide information showing the ability to put the workers on the payroll when certification is granted.

The CO specifically noted that the regulations did not place the burden of proof on the CO.

The CO questioned whether there was a current job opening to which U.S. workers could be referred, or whether there was a current existing business operated by the Employer. According to the CO, information obtained from the Guam Department of Labor indicated that the Employer had used temporary, non-immigrant workers from China in the past, but had difficulty in obtaining visas for these workers, due to a State Department ban on the issuance of temporary visas from China to Guam. The CO noted that a question had been raised as to whether the Employer was trying to convert temporary workers to immigrant status to bypass this ban.

The CO noted that the Employer's attorney stated that the Employer would need the skilled workers by the time the processing was completed and the visas actually issued. The CO concluded that there were no permanent job opportunities that were currently available to qualified U.S. applicants. The Employer was instructed to submit rebuttal showing that the jobs being offered were full-time permanent positions, and not temporary positions for which temporary labor certification would normally be sought. The Employer was specifically instructed to show that the job opportunities were currently available. The CO indicated that, if the positions being offered were for work on a construction contract, the Employer should provide the contract and indicate the expected duration of each project. The CO noted that the Employer's rebuttal must be "sufficient to show how there are permanent labor certification positions as distinct from offers of temporary employment."

Finally, the CO noted that many of the alien applicants had been working for the Employer under the H-2B temporary worker category. The Employer was instructed to document how it was determined that these jobs became permanent, full-time positions; specifically, the Employer was instructed to provide documentation showing if these workers' pay had been cyclical or year round. The CO noted that W-2 forms would show if the workers are employed all year at the wage rate; and that Forms 941, federal payroll tax returns for the last four quarters, would show if the employment of these workers has truly been continuous.

REBUTTAL

In Rebuttal, the Employer argued that the Act was prospective, and that conditions were to be certified as of the time the Alien entered the United States. Employer argued that the regulations did not take into account the fact that it takes three to four years to process a certification, and it was unreasonable to prohibit employers from laying off skilled workers while an application for labor certification was pending.

Nevertheless, Employer stated that the effect of the layoffs in relation to the positions offered was minimal, and referred to a letter dated March 10, 2000, setting out the hiring and termination of skilled workers in 1999. According to Employer, only five carpenters were laid-off, and any skilled worker who had been laid-off would be hired if they were available at the time the Employer recruited.

The Employer submitted its corporate income tax return for 1998, showing a gross annual

income of $2.6 million, as well as a preliminary 1999 financial statement showing over $3.6 million in revenues. Employer also submitted documentation reflecting that there are three revolving lines of credit available from financial institutions on Guam, with immediate access to a total of $790,000. The Employer also submitted four Employer Quarterly State Wage Reports, for the calendar year 1999, noting that the reports show total wages paid in the fourth quarter of 1999 as $365,817.72, and average quarterly wages paid in 1999 of $406,000, paid to an average of 97 employees.[3]

In addition, the Employer submitted copies of three housing development project contracts, for a total of almost $11.6 million, for 144 single-family residences. Employer noted that the first contract, dated November 11, 1998, was underway, with about 11 of the 40 houses nearing completion. Employer indicated that the primary reason for the limited progress was the lack of available skilled workers, and that the cement masons were urgently needed to work on the project.

The second contract, with the same owner-developer, was an extension of the first contract, for the construction of 41 units. The Employer submitted a surveyor's map of the housing project, showing the relationship of the 81 lots making up the first two construction contracts.

The third contract, dated April 13, 2000, is for the construction of 63 houses. The Employer submitted a letter from the surveyor, stating that initial survey work on the project was being done, but that the owner-developer has agreed that the construction work could not begin until the skilled workers arrive on Guam.

The Employer argued that this financial information showed that it had the ability to pay the offered wages to the cement masons. Additionally, the Employer argued that the existence of the three contracts demonstrated an "abundance" of work, which was being delayed primarily because skilled workers were not available. The Employer noted that since its establishment in 1995, it has consistently recruited for any U.S. skilled worker on Guam, continuously employing on a full-time basis many H-2B nonimmigrant skilled workers. As part of the application process for temporary labor certification, the Employer was required to actively recruit available U.S. workers. Specifically, the Employer applied in January 2000 for the renewal and importation of 50 temporary H-2B skilled workers. According to the Employer, after it advertised and recruited for U.S. workers, three cement masons were hired, but none reported to work. According to the Employer, the reality on Guam is that there are no skilled U.S. workers to fill positions on Guam.

The Employer also acknowledged that the U.S. State Department has imposed a ban on the issuance of H-2B visas from mainland China, but "categorically denied" that the applications for

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[3] These wage reports show that the Employer paid wages to 77 of its 109 employees in the first quarter of 1999, 86 of its 108 employees in the second quarter, 96 of its 106 employees in the third quarter, and 93 of its 94 employees in the fourth quarter.

permanent labor certification were in any way related to the inability of employers to import H-2B workers.

The Employer argued that the three contracts show that there is sufficient work over the next several years to employ all of the nonimmigrant H-2B workers for which the Employer has applied, as well as all of the workers included in the permanent labor certification applications. The Employer claimed that it was ready, willing, and able to employ any skilled worker who is available by any means to fill the job openings.

In conclusion, the Employer stated that it met all of the regulatory requirements, and that there are not any U.S. workers who are able, willing, qualified, and available for work on Guam, and thus that the permanent employment of the subject Aliens would not have an adverse effect upon the wages and working conditions of U.S. workers similarly employed.

FINAL DETERMINATIONS

The CO issued his Final Determinations (FDs), denying certification on the basis that the Employer did not comply with the instructions in the NOFs to attempt to recruit its own laid-off workers, and to document the results of the recruitment. Nor did the Employer comply with the instructions in the NOFs to document the status of its workers. The CO noted that the Employer stated that any skilled worker who had been laid off would be hired if they were available at the time the Employer recruited. The CO stated:

> It is implicit in the rebuttal that the employer believes that the labor certification process is delaying its projects. However, the employer should have a job opening when the application for labor certification is submitted. Assertion that a labor certification process would take any particular amount of time does not provide a basis for failure to comply with the instructions to attempt to recruit its own laid off workers and to document the results of the recruitment. Therefore although the [employer] has offered to recruit its own laid off workers at some time in the future, the employer has failed to comply with the instructions in the NOF to conduct such a recruitment and document the results at this time.

The CO also noted that although the Employer argued that the lack of availability of workers was delaying projects, information that was provided in rebuttal showed that it had a large number of employees in 1999, and the Employer had given no explanation about the status of the majority of these workers, as instructed in the NOFs.

The CO noted the Employer's history of continuous employment of temporary workers under the H-2B program since 1995, as well as the Employer's claim that it did not submit the applications for permanent labor certification as a result of a problem with the issuance of temporary visas for temporary workers. The CO concluded that:

> However, at bottom, the employer has not shown that there are permanent jobs for its workers, including these 30 cement masons. The employer has clearly already conducted significant construction work in 1999, as evidenced by the salaries paid to the workers. Projects shown by the employer's 1999 contracts and the year 2000 contract do not establish how there are now permanent jobs that come under the permanent alien labor certification category. Instead, it appears that the contracts show temporary employment opportunities for a specific project.

(AF 14). The CO concluded that he could not find that there were thirty permanent positions that were truly open to any qualified cement mason.

Employer filed Requests for Review, and the matters were docketed in this office.

DISCUSSION

The NOF questioned whether the Employer had a permanent job opportunity that was truly open to U.S. workers, and whether U.S. workers who had been laid off by the Employer were available for the described positions. The burden of proof in the labor certification process is on the Employer. *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997); *Marsh Edelman*, 1994-INA-537 (Mar. 1, 1996); 20 C.F.R. 656.2(b). As was noted by the Board of Alien Labor Certification Appeals (Board) in *Carlos Uy III*, 1997-INA-304 (Mar 3, 1999)(*en banc),* "[u]nder the regulatory scheme of 20 C.F.R. Part 24, rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued." *Id.* at 8. The Employer has the burden of satisfactorily responding to or rebutting all findings in the NOF. *Belha Corp.*, 1988-INA-24 (May 5, 1989) (*en banc*). Where the CO requests documents or information with a direct bearing on the resolution of an issue and which is obtainable by reasonable effort, the employer must provide it. *Gencorp,* 1987-INA-659 (January 13, 1988) (*en banc*).[4]

Section 656.3 provides that "employment" means permanent, full-time work by an employee

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[4] Thus, although the Employer argues on appeal that the CO should "acquaint himself with the economic, business and labor environment on the island," the CO is not required to do so. Rather, it is the Employer's burden to provide the documentation necessary to support a grant of labor certification. Thus, while the Employer argues that "even a cursory inquiry would reveal that there are very few qualified applicants for skilled construction-trade jobs," it is not the CO's responsibility to make that inquiry - it is the Employer's responsibility to provide the documentation necessary to conclude that there are no available U.S. workers for the positions in question. Indeed, the failure to submit documentation reasonably requested by the CO can itself warrant denial. *Rouber International,* 1991-INA-44 (March 31, 1994).

for an employer other than oneself. The employer bears the burden of proving that a position is permanent and full time. If the employer's own evidence does not show that a position is permanent and full time, certification may be denied. *Gerata Systems America, Inc*., 1988-INA- 344 (Dec. 16, 1988). Further, if a CO reasonably requests specific information to aid in the determination of whether a position is permanent and full time, the employer must provide it. *Collectors International, Ltd.*, 1989-INA-133 (Dec. 14, 1989).

The CO specifically requested the Employer to provide documentation showing that the jobs in question are not temporary, and are currently available; and if the jobs exist as a result of particular contracts, to provide the contracts and indicate their duration. The CO also pointed out that the Employer previously employed many H-2B workers, and specifically requested that the Employer show how these positions had become permanent. In this regard, the CO requested that the Employer provide documents showing whether the wages paid to previous workers in these positions were cyclical, or year round.

In response, the Employer submitted documentation suggesting that it has the financial ability to pay wages for the positions in question, but did not address the question of whether those positions are in fact permanent. The three contracts submitted, as well as the financial information submitted, show that the Employer performed significant construction work in 1998 and 1999, and that it has a significant amount of construction work that is currently on hold because of the unavailability of skilled workers. But the fact that the Employer has contracts for construction projects does not establish that the Employer has permanent jobs.

It is significant that, from its inception in 1995 until very recently, the Employer used H-2B workers for its projects. By definition, the positions filled by these workers are temporary, and indeed, the Employer is required to so certify in order for these workers to obtain temporary visas. The Employer provided absolutely no explanation as to how the positions filled by these workers changed from temporary to permanent.

Specifically, the Employer did not provide the information requested by the CO about the status of its workers. The Quarterly State Wage Reports for 1999 show that the Employer paid a different number of workers every quarter of that year, ranging from 77 to 96. The Employer represented in rebuttal that its temporary workers returned to China on the expiration of their H2-B visas, and that it has not been able to perform under its contracts because of the lack of skilled workers. But the Employer has provided no information showing how many employees it now has, whether it has hired additional temporary or permanent workers, or whether it employs any U.S. workers.

The Statement of Qualifications submitted for each of the Aliens show that each of them worked from June 1998 to the "present" (the applications are dated April 15, 1999) as a cement mason for the Employer, with job dues that are identical to the job duties as set out on the ETA 750s.

Although each of the Aliens' present address is listed as the Employer's company housing, the Statements of Qualification indicate that the Aliens, who have H2-B visas, will apply for visas at the American Consulate in Guangzhou, China.

Thus, each of the Aliens worked for the Employer on a temporary H2-B visa, and returned to China when the visa expired. As the Employer is now unable to obtain H2-B visas for these workers, due to a State Department hold on the issuance of H2-B visas from China, the Employer is seeking to hire these workers, for the same positions that were "temporary" when they were issued their H2-B visas, under the permanent alien labor certification program. But the Employer has not explained how these temporary positions have now become permanent.[5]

The CO specifically requested the Employer to provide documentation showing whether the wages paid to its workers were cyclical or year round. The Employer did not submit copies of the workers' W-2's, or Forms 941, federal payroll tax returns, as suggested by the CO, although the Employer did provide state quarterly wage reports for 1999. The existence of W-2s for the employees working as cement masons would at least indicate an employer-employee relationship. That the Employer did not provide this specifically suggested documentation certainly raises the question of whether its workers have been treated as employees who receive W-2s, or as independent contractors who receive 1099s, a factor that bears on the issue of whether the jobs in question are permanent or temporary.

In short, the Employer provided no information that would allow the CO to determine whether the Employer **currently** has any openings for cement masons, and whether those positions are permanent or temporary.[6]

The Employer repeatedly blames the CO for its "dire" circumstances, that is, its inability to complete its existing contracts because of the unavailability of sufficient skilled construction-trade workers. Of course, it is not the CO's responsibility to ensure that the Employer has sufficient labor to honor its contracts. It is the responsibility of the Employer to document, with more than unsubstantiated statements, that it has permanent positions for the applications it seeks to have approved.

In short, even if the Employer has work available under its existing contracts, and the ability to pay wages for that work, the Employer has provided no information or documentation to establish that

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[5] This factual scenario certainly suggests that the CO's suspicions that the Employer is attempting to convert its temporary workers to immigrant status in order to bypass the State Department's ban on the issuance of temporary visas from China to Guam may be justified.

[6] The Employer stated that it would be in need of skilled workers by the time the certification process was completed and the visas were actually issued. Although the CO requested that the Employer show that these jobs are **currently** available, the Employer did not do so.

the positions for cement masons, which were previously filled by temporary immigrant workers, have now become permanent. The emphasis here is on "permanent," an issue that the Employer has failed to address adequately. The Employer argues on appeal "it may be assumed" that in the future the Employer will enter into additional contracts and thus create permanent positions for its skilled labor force. Such an assumption, even if accepted, does not document that there now exist any *permanent* openings for cement masons with the Employer. Indeed, the reasonable inference is that these positions are job-specific, and that the workers who are hired to perform under these contracts will be let go when the projects are finished.

The Employer argues on appeal that, using the "totality of circumstances" test set forth by the Board in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*), the facts clearly and convincingly show that the Employer has the ability to pay the prevailing wage to employees who will work full time, and that the Employer previously employed U.S. workers or H2-B workers who are not, nor are they ever expected to be, available in sufficient numbers to perform the three outstanding contracts, as well as future work, causing the Employer to be in desperate need of skilled construction trade workers, and that, given the level of the Employer's compliance and good faith in the application process, certification should be granted.

Setting aside the fact that the Employer has **not** complied with most of the CO's reasonable requests for documentation, the documentation provided to the CO does not establish that any of the positions for cement mason are permanent (indeed it strongly suggests the opposite). The Employer argues on appeal that

> The CO is constrained by 20 CFR §656.24(b) above, to limit his consideration of the application to whether a U.S. worker will be adversely affected by the alien's employment. Instead of restricting his decision to the factors relating to U.S. versus alien labor, the CO in this denial is primarily concerned with permanent alien labor versus temporary alien labor.

Employer's Appeal Brief at p. 7. Employer is simply incorrect: it is the Employer's burden to document the existence of a permanent, full time position that is clearly open to U.S. workers. This Panel does not find the vituperation directed at the CO by the Employer, and the suggestion of a "hidden agenda" on the part of the CO, to be persuasive. The frustration of the Employer in not being able to find enough workers to fulfill its contracts does not change the fact that there is nothing in the record to document that the positions for cement mason, previously treated as temporary by the Employer, have now become permanent. Under these circumstances, the CO correctly denied certification.

As the CO's denial of certification is being affirmed on the ground that the Employer did not document the existence of permanent, full time positions, it is not necessary to address the CO's other ground for denial, that is, that the Employer failed to document that workers who had previously left its

employ were not available for these positions.[7]

ORDER

The Certifying Officer's denial of labor certification in these 30 cases is hereby **AFFIRMED** and certification is denied.

Entered at the direction of the panel by:

A
LINDA S. CHAPMAN
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five

[7] We note that the fact that the labor certification process may be lengthy does not excuse the Employer from complying with the CO's directive to attempt to recruit its own laid-off employees and document the results. Nor is it sufficient for the Employer to state that any skilled worker who has been laid-off will be hired if they are available at the time the Employer decides to recruit. Nor is the CO required to accept the Employer's bald and unsupported claim that "there is not any U.S. worker who is able, willing, qualified and available for work on Guam."

double-spaced pages. Upon the granting of a petition the Board may order briefs.